

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
FIRESIDE MEDIA)	File No. BNP-20040130APE
)	Facility ID No. 161371
For a New AM Broadcast Station at Larga Vista, Texas)	
)	
and)	
)	
For a New AM Broadcast Station at Pass Christian, Mississippi)	File No. BNP-20040130APU
)	Facility ID No. 161128
)	
and)	
)	
JET FUEL BROADCASTING)	File No. BNP-20040130AQL
)	Facility ID No. 161328
For a New AM Broadcast Station at Winooski, Vermont)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: June 4, 2010

Released: June 4, 2010

By the Commission:

I. INTRODUCTION AND BACKGROUND

1. In this *Memorandum Opinion and Order*, we address three Applications for Review (collectively, the “Garey AFRs”),¹ two filed by Fireside Media (“Fireside”), and one filed by Jet Fuel Broadcasting (“JFB”). Both Fireside and JFB are sole proprietorships of Mr. Dave Garey (“Garey”).² As discussed below, we dismiss both the Garey AFRs and the above-captioned applications.

¹ In connection with the Larga Vista application, the AFR was styled, “Application for Review Seeking Emergency Tolling/Extension of Time to File 301 Application for New 1600 kHz Radio Service At Larga Vista, TX Due to Unresolved Special Circumstance, With Request for Allowance to Make Oral Arguments Before the Commissioners Prior to Vote” (“Larga Vista AFR”). Fireside’s AFR in connection with the Pass Christian application was styled, “Application for Review Seeking Emergency Extension of Time to File 301 Application for Construction Permit Due to Special Circumstance” (“Pass Christian AFR”). JFB filed an “Application for Review Seeking Full 60-Day Filing Window to Apply for Construction Permit for New Station at Winooski, VT, With Request to Make Oral Arguments Before Commissioners Prior to Vote” (“Winooski AFR”).

² Because Fireside and JFB are sole proprietorships, those terms and “Garey” will be used interchangeably herein.

2. Fireside and JFB each filed a short-form (FCC Form 175) application in the January 2004 filing window for AM Broadcast Auction 84 (“Auction 84”).³ Both proposed several different new AM facilities, for which Fireside and JFB filed separate “tech box” applications referenced in their Forms 175. All of the facilities at issue here were originally mutually exclusive with AM facilities or modifications proposed by other Auction 84 window applicants. Through various means, the three captioned applications – Fireside’s applications for new AM stations at Larga Vista, Texas,⁴ and Pass Christian, Mississippi,⁵ and JFB’s application for a new AM station at Winooski, Vermont⁶ – became “singletons,” that is, were no longer mutually exclusive with other proposals also filed in the January 2004 window. Accordingly, Fireside and JFB were directed, by staff letters, to file long-form (FCC Form 301) applications for the respective proposed facilities within 60 days of the date of each letter.⁷

3. Fireside and JFB did not file Form 301 applications within the prescribed periods. In the case of the Winooski application, JFB filed with the Media Bureau (“Bureau”) an April 25, 2008, “Request for Extension of Time to File 301 Application for Construction Permit Due to Special Circumstances” (“JFB Request”), seeking to delay filing Form 301 until 60 days after “the date when the Commission implements a final order eliminating the crippling debtor status currently in force against [JFB].”⁸ The Bureau denied the JFB Request in part by staff decision dated May 8, 2009.⁹ Rather than file Form 301 within the additional 30 days granted by the staff decision, JFB timely filed the Winooski AFR on June 8, 2009. Upon being directed by the staff to file Form 301 applications for Pass Christian and Larga Vista, Fireside did not seek extensions of time from Bureau staff, but instead filed the Pass Christian and Larga Vista AFRs, seeking immediate Commission review. All three of the Garey AFRs, while styled and argued somewhat differently from each other, are premised on claims that Fireside and JFB should not be required to file long-form applications until the Commission eliminates what Garey believes are fatal encumbrances to his status as an applicant and potential Commission licensee. The gravamen of the Garey AFRs is the contention that Garey suffered “irreparable federal debtor status,”¹⁰

³ See *AM New Station and Major Modification Auction Filing Window; Minor Modification Application Freeze*, Public Notice, 18 FCC Rcd 23016 (MB/WTB 2003).

⁴ File No. BNP-20040130APE. In February 2010, the Larga Vista application was inadvertently dismissed in the Bureau’s Consolidated Data Base System. Although the staff reinstated the application upon learning of the error, a third-party vendor informed Fireside of the dismissal, in response to which Fireside filed an Application for Review (“Second Larga Vista AFR”) seeking reinstatement of the application and also “reiterating” the pending Larga Vista AFR. Based on our disposition of the Larga Vista AFR and the Larga Vista application herein, we dismiss the Second Larga Vista AFR as moot.

⁵ File No. BNP-20040130APU.

⁶ File No. BNP-20040130AQL.

⁷ See *La Vida Catolica, Fireside Media, Trade Media Corporation, and RAMS III*, Letter, Ref. No. 1800B3-BSH/LAS (MB July 30, 2009); *GHB of Augusta, Inc. and Fireside Media*, Letter, Ref. No. 1800B3-LAS/JP (MB May 1, 2008); *RAMS, IV and Jet Fuel Broadcasting*, Letter, Ref. No. 1800B3-LAS/JP (MB Feb. 25, 2008).

⁸ JFB Request at 1.

⁹ *Jet Fuel Broadcasting*, Letter, Ref. No. 1800B3-LAS (MB May 8, 2009) (“Winooski Staff Decision”). In the Winooski Staff Decision, the Bureau noted that because the Commission had recently released an order resolving Garey’s debtor status, it would grant JFB an additional 30 days in which to file Form 301. Winooski Staff Decision at 3. See *infra* nn. 16-19 and accompanying text.

¹⁰ Winooski AFR at 2.

“imposed against [Garey] without due process,”¹¹ as a result of “an irreparable, illegal punishment that has negatively impacted [Garey’s] daily existence *for nearly two and a half years.*”¹² The referenced “punishment” was the imposition of penalties for bids withdrawn by Garey in FM Broadcast Auction 37. Specifically, following established auction procedure,¹³ the Bureau and the Wireless Telecommunications Bureau imposed penalties for bids withdrawn by Garey d/b/a Fireside in FM Broadcast Auction 37, held in November 2004. A withdrawal penalty of \$8,250 was satisfied from Fireside’s Auction 37 upfront payment, and additional withdrawal penalties totaling \$108,892 were imposed after two other permits, for which Fireside had withdrawn high bids in Auction 37, were sold for lesser amounts in Auction 62.¹⁴ Garey insists that his Auction 37 bid withdrawals were “innocent,” and that the penalties were assessed improperly and without due process.¹⁵

4. The Commission compromised Fireside’s penalty obligations, forgiving the \$108,892 penalty and returning to Fireside half of its Auction 37 upfront payment, based on Garey’s showing that he was financially unable to pay the penalties.¹⁶ Despite the compromise of his penalties, Garey filed an October 6, 2008, Petition for Partial Reconsideration of the *Fireside Media Order* (“Fireside Petition”), seeking, among other things, amendment of the language of the *Fireside Media Order* to include affirmative statements that Garey would continue to be allowed to prosecute other applications before the Commission,¹⁷ that the “irreparable debtor status” was imposed upon him illegally and without due process,¹⁸ and that Fireside “committed absolutely no illegal activity or misconduct inherent to withdrawing from Auction 37 without purchase.”¹⁹ We rejected Garey’s proposed amendments to the *Fireside Media Order* and denied the Fireside Petition in a decision released February 24, 2010.²⁰ The Garey AFRs, which were filed before the recent *Fireside Reconsideration Order*, argue that Fireside and

¹¹ Larga Vista AFR at 3.

¹² Pass Christian AFR at 3 (emphasis in original).

¹³ On withdrawal penalties generally, *see* 47 C.F.R. §§ 1.2104(g), 73.3568(a)(3). Bidding procedures for Auction 37, including the penalties for bid withdrawal, were announced in *Auction of FM Broadcast Construction Permits Scheduled for November 3, 2004, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Auction Procedures*, Public Notice, 19 FCC Rcd 10570, 10603-04 (WTB/MB 2004).

¹⁴ The specific penalties imposed on Fireside are set forth in *FM Broadcast Construction Permits Auction Closes – Auction No. 37 Winning Bidders Announced; Payment and Application Deadlines Established*, Public Notice, 20 FCC Rcd 1021 (MB/WTB 2004) (announcing an \$8,250 penalty for withdrawing a high bid for the Eureka, Montana, permit, which was sold for a lesser amount in Auction 37; penalty satisfied from Fireside’s upfront payment), and *Auction of FM Broadcast Construction Permits Closes – Winning Bidders Announced for Auction No. 62*, Public Notice, 21 FCC Rcd 1071, 1100 (MB/WTB 2006) (“Auction 62 Closing Public Notice”) (after re-auction of Breckenridge, Texas, and Manville, Wyoming, permits in FM Auction 62, high bids for both of which were withdrawn by Fireside in Auction 37, withdrawal penalties were established at \$41,137 and \$67,755, respectively).

¹⁵ *See supra* nn. 10-12.

¹⁶ *Fireside Media, Order*, 23 FCC Rcd 13138 (2008) (“*Fireside Media Order*”).

¹⁷ Fireside Petition at 4.

¹⁸ *Id.* at 6-8.

¹⁹ *Id.* at 13.

²⁰ *Fireside Media*, Memorandum Opinion and Order, 25 FCC Rcd 2453 (2010) (“*Fireside Reconsideration Order*”). *See* discussion at paragraph 6, *infra*.

JFB are unable to prosecute their other applications pending with the Commission, absent adoption by the Commission of the language requested in the then-pending Fireside Petition, hence the requests for extension of time to file Forms 301.²¹

II. DISCUSSION

5. Under our Rules the Larga Vista AFR and the Pass Christian AFR are procedurally improper. “No application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass.”²² Fireside did not afford the Bureau an opportunity to pass on its requests for extension of time, thus its two applications for review are dismissed. Additionally, because we categorically rejected the premise underlying the Garey AFRs, namely, that the withdrawal penalties imposed on him were unlawful, all three of the Garey AFRs are moot.²³ For these reasons, the Garey AFRs are dismissed.

6. Moreover, even were we to consider the Garey AFRs on their merits, we would reject his claims. Stripped to its essence, Garey’s argument is that the withdrawal payments against Fireside were assessed illegally and without due process, caused him unjustly to be labeled a “federal debtor,” and thus resulted in his alleged inability to secure financing with which to continue to prosecute the three applications at issue here. This argument lacks merit. Contrary to repeated assertions in both the Fireside Petition and the Garey AFRs, there was never any question as to the legality or the propriety of the penalties compromised in the *Fireside Media Order*. As we stated in the *Fireside Reconsideration Order*, “the Commission did *not* predicate compromise upon any finding that the bid withdrawal payment was erroneous or undeserved,” concluding that “none of the amendments Fireside Media seeks are justified in light of the soundness of the underlying determination that it owed a bid withdrawal payment as a result of its withdrawn bids.”²⁴ As we explained in denying the Fireside Petition, the Commission granted relief in the *Fireside Media Order* as a result of his demonstration that he lacked the ability to pay the penalties assessed.²⁵

7. In addition, Garey’s financial difficulties do not justify his failure to timely file applications for construction permits.²⁶ The Bureau properly directed Garey to timely initiate the process

²¹ See, e.g., Pass Christian AFR at 3-4 (“Given the proliferation of the debtor status, [Fireside] must understandably ask for an extension of time to cover the costly FCC 301 filing, inclusive of both the FCC charges, and the expensive engineering showing that must be included as a requisite part of the 301 application.”) See also Larga Vista AFR at 3, Winooski AFR at 2.

²² 47 C.F.R. § 1.115(c).

²³ See, e.g., *Petition of the State Independent Alliance and the Independent Telecommunications Group for a Declaratory Ruling that the Basic Universal Service Offering Provided by Western Wireless in Kansas is Subject to Regulation as Local Exchange Service*, Memorandum Opinion and Order, 25 FCC Rcd 1576, 1577 (2010) (“Agency decisions become moot when no live controversy remains for review,” citing *Tenn. Gas Pipeline Co. v. Fed. Power Comm’n*, 606 F.2d 1373, 1379 (D.C. Cir. 1979)).

²⁴ *Fireside Reconsideration Order* at 2458 (emphasis in original).

²⁵ *Id.* at 2457-58.

²⁶ Garey also argues that we have labeled him an “ineligible, unqualified licensee.” See, e.g., Larga Vista AFR at 3. This stems from an argument made in the Commission’s brief in *Alvin Lou Media, Inc. v. F.C.C.*, 571 F.3d 1 (D.C. Cir. 2009) (“*Alvin Lou*”). The Commission there argued that due to the compromise of Garey’s withdrawal penalty on the ground of financial hardship, appellant Alvin Lou Media (of which Garey is president and sole shareholder) might be considered ineligible for a license, could not state a redressable injury and, thus, lacked standing. *Alvin* (continued)

leading to construction permit issuance by filing Form 301 within set time periods. Even if Garey were experiencing momentary cash flow difficulties, the Form 301 filing deadlines neither required nor allowed him to commence station construction.²⁷ Given that part of the relief Garey sought in the Fireside Petition was an affirmation of his continued ability to prosecute applications before this Commission, it is incongruous at best for him to argue that he should be excused from timely prosecuting the three applications at issue here.²⁸

8. Finally, the Garey AFRs do not meet the requirements for waiver of the long form filing deadline. Waiver is appropriate only on a showing of special circumstances warranting a deviation from the general rule, as well as a showing that such deviation is in the public interest.²⁹ The only circumstances presented by Garey are his erroneous characterizations of the nature of the relief granted him in the *Fireside Media Order*, and allegations regarding the effect of that order on his ability to pursue applications for new radio facilities. Given that we have already rejected these assertions, they cannot constitute circumstances that would warrant any deviation from our processing policies, which are designed to promote a fair and efficient licensing process for all applicants.³⁰ The public interest is not served by waiving filing deadlines to permit Commission consideration of misleading and ultimately meritless arguments. To do so would merely encourage the filing of frivolous pleadings in order to obtain *de facto* stays pending review of such pleadings.³¹

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Lou, United States Court of Appeals, District of Columbia Circuit, No. 08-1067, Respondent's Brief at 22. We need not dwell on Garey's argument, as the court in its decision rejected the Commission's contention. *See Alvin Lou*, 71 F.3d at 7 (Commission's finding regarding Garey's financial condition in 2004 and 2005 "does not speak to [Garey's] financial situation in February 2008, when [Alvin Lou Media] filed its appeal in this court."). Notwithstanding the fact that the Commission raised this argument in a brief, the Garey AFRs identify no instance in which the Commission actually treated him as "ineligible" or "unqualified."

²⁷ *See, e.g., Christian Broadcasting of the Midlands, Inc.*, Order, 103 F.C.C.2d 375 (1986). The amounts required to prepare and file Form 301 are a relatively small percentage of the overall cost of building a new AM facility.

²⁸ We also reject Garey's assertion, set out in the Larga Vista AFR, that extension of time is necessary due to "severe health issues" allegedly arising between July and September of 2009. Larga Vista AFR at 4. We note that Garey's medical condition did not preclude his drafting and filing the Larga Vista AFR and engaging in other communications with Commission staff. We therefore see no reason why he could not have filed Form 301. Additionally, these facts have no bearing on Garey's ability to prosecute the Pass Christian and Winooski applications, in which Forms 301 were due prior to the onset of his stated health issues.

²⁹ *See Northeast Cellular Telephone Co. v. F.C.C.*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) ("*Northeast Cellular*") ("[A] waiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest," citing *WAIT Radio v. F.C.C.*, 418 F.2d 1153, 1157-59 (D.C. Cir. 1969)).

³⁰ *See, e.g., Winstar Broadcasting Corp.*, Order on Reconsideration, 20 FCC Rcd 2043, 2053-54 (2005) (consistent application of the auction rules to all bidders is essential to a fair and efficient licensing process, and is fair to all auction participants). *See also TPS Utilicom, Inc.*, Order, 16 FCC Rcd 14835, 14841 (WTB 2001) ("[T]he Commission's auction process must be both fair and consistent," and maintaining the integrity of the auctions process benefits all applicants).

³¹ While the Larga Vista AFR is partially styled as a request for "emergency tolling," such relief is unavailable here. The term "tolling" refers to suspension of the construction period for a station, not a delay in filing an application. 47 C.F.R. § 73.3598(b). In any event, it is well established that tolling is only available to an applicant involved in administrative review that is beyond its control, i.e., brought by a third party, not to an applicant that has itself prolonged administrative proceedings by seeking review of a staff or Commission action. *See, e.g., Birach Broadcasting Corp.*, Memorandum Opinion and Order, 23 FCC Rcd 3141, 3146 (2008) (citing *Texas Grace Communications*, Memorandum Opinion and Order, 16 FCC Rcd 19167, 19172 (2001)).

9. In summary, even were we to consider the Garey AFRs on their merits, Garey has presented no basis justifying waiver or extension of his deadlines for filing the Fireside and JFB Form 301 applications referenced herein. We observe that well over 60 days have elapsed since Garey was invited to file those long-form applications, and that over 60 days have elapsed since we rejected the predicate of the Garey AFRs when we denied relief in the *Fireside Reconsideration Order*. Garey has thus had ample opportunity to prosecute his applications. For the reasons set forth above, we dismiss the Garey AFRs. As each of the Bureau's letters cautioned Garey that failure timely to file Form 301 would result in dismissal of the above-captioned "tech box" applications under Section 73.3568 of our Rules,³² for failure to prosecute the applications, we also dismiss those applications.

IV. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED, that the Larga Vista AFR, the Pass Christian AFR, and the Winooski AFR, ARE DISMISSED.

11. IT IS FURTHER ORDERED, that the tech box application of Fireside Media for a new AM broadcast station at Larga Vista, Texas, File No. BNP-20040130APE, the tech box application of Fireside Media for a new AM broadcast station at Pass Christian, Mississippi, File No. BNP-20040130APU, and the tech box application of Jet Fuel Broadcasting for a new AM broadcast station at Winooski, Vermont, File No. BNP-20040130AQL, ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

³² 47 C.F.R. § 73.3568.